

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

VICTOR PEREZ, as Special Administrator of
the Estate of Carlos Perez, deceased, and as
the Guardian Ad Litem for S.E.P. and A.I.P.,

Plaintiff

v.

JAMES GREG COX, et al.,

Defendants

Case No.: 2:15-cv-01572-APG-DJA

Order

[ECF Nos. 146, 147, 153, 159, 201]

This case arises from the death of inmate Carlos Perez, who was shot with birdshot by a correctional officer while in the custody of the Nevada Department of Corrections (NDOC) at High Desert State Prison (HDSP). The plaintiff is Perez's brother, Victor Perez, as special administrator of Perez's estate and as guardian ad litem to minors S.E.P. and A.I.P (collectively, the plaintiffs). Defendants Jeff Castro, Isaiah Smith, and Raynaldo-John Ramos are the three correctional officers involved in the shooting. Defendant Ronald Oliver arrived on the scene after the shooting. At the time of the incident, defendant Greg Cox was NDOC's director, defendant Dwight Neven was HDSP's warden, and defendant Timothy Filson was the assistant warden. Defendant State of Nevada operates NDOC.

The plaintiffs asserted claims against all defendants under 42 U.S.C. § 1983 for excessive force, deliberate indifference, and loss of familial association. They also sued all defendants under Nevada law for wrongful death and intentional infliction of emotional distress (IIED). Finally, they asserted a claim for negligent training, supervision, and retention against Cox and Neven. In four separate motions, the defendants move for summary judgment on all remaining claims on a variety of grounds.

1 **I. BACKGROUND**

2 Perez was an inmate at HDSP housed in unit 2A/B, which is a two-story unit with
3 showers separating the A and B sides of the cells. ECF No. 146-2 at 3. Unit 2A/B is a
4 segregation unit, which requires special handling of the inmates. *Id.* Inmates were supposed to
5 be let out only one at a time and be restrained with handcuffs behind their backs any time they
6 were let out of their cells. *Id.*

7 Under normal procedure, to escort an inmate to the shower, the correctional officer
8 advises the inmate that it is his turn, and the inmate puts his hands behind his back to be
9 handcuffed through the cell's food flap. *Id.* at 4. The correctional officer then signals the officer
10 in the control room (or "bubble"¹) to open that cell door. *Id.* The correctional officer then
11 escorts the inmate to the shower, where the inmate is locked in and unhandcuffed. *Id.* When the
12 inmate is done showering, the process is reversed to take him back to his cell, again in handcuffs
13 and individually escorted. *Id.* at 4-5. Despite this procedure, defendant correctional officer
14 Castro testified that he and other correctional officers regularly failed to individually escort the
15 inmates, instead using a procedure of "pitch and catch," where they would allow the inmate to
16 walk back to his cell alone and then the bubble officer would close the cell door. ECF Nos. 146-2
17 at 5; 176-5 at 21-23.

18 On November 12, 2014, Castro let Perez out of the shower to walk back to his cell
19 unescorted. ECF No. 146-2 at 5-6. While Perez was returning to his cell, Castro handcuffed
20 another inmate, Andrew Arevalo, who was also in a shower. *Id.* Castro opened the shower door,
21 and Arevalo ran down the hall. *Id.* at 6. Castro saw that Perez was still in the hall, so he started
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¹ The bubble is an enclosed control room that allows the officer within to observe the unit. *See*
ECF Nos. 147-3 at 12, 16; 146-2.

1 yelling at Arevalo to get on the ground. *Id.* Arevalo did not comply and ran up to Perez. *Id.*
 2 Perez and Arevalo, who were handcuffed behind their backs, started kicking each other.² *Id.*
 3 According to another inmate, Brandon Castner,³ Arevalo and Perez were only tentatively kicking
 4 at each other because neither one wanted to fall and be vulnerable to further attack. ECF No.
 5 175-8 at 4. Castro continued to order Arevalo and Perez to the ground, but neither complied.
 6 ECF No. 146-2 at 7.

7 Defendant correctional officer Smith was on the lower level in unit 2A/B. *Id.* at 16. He
 8 heard inmates yelling and saw the men kicking at each other, although he could not tell if they
 9 were making contact. *Id.* He gave some verbal commands but did not go upstairs immediately
 10 because he was securing an inmate on the lower level. *Id.* at 12, 18. Once he locked that inmate
 11 in a cell, he ran upstairs to assist. *Id.* at 18.

12 Defendant Ramos was the correctional officer in the bubble. *Id.* at 7. Ramos ordered the
 13 inmates to get on the ground. *Id.* at 7. They did not comply so Ramos grabbed a shotgun. *Id.* at
 14 7, 31. Castro heard Ramos rack the shotgun, so he backed up because he did not want to be hit
 15 by shotgun pellets. *Id.* at 7, 68. Ramos ordered the inmates to get on the ground or he would
 16 shoot. *Id.* at 31. The inmates continued to fight, so Ramos fired a blank round (referred to as the
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 19 ² There is some dispute about whether Perez or Arevalo was let out of the shower first and which
 inmate instigated the fight, but no party argues that these disputes are material to resolution of
 the pending motions.

20 ³ Defendant Smith objects to Castner's testimony as hearsay because during Castner's
 21 deposition, he read his prior written statement into the record rather than giving a firsthand
 22 account. ECF No. 194 at 6. However, "[a]t the summary judgment stage, [I] do not focus on the
 23 admissibility of the evidence's form. [I] instead focus on the admissibility of its contents."
Fraser v. Goodale, 342 F.3d 1032, 1036 (9th Cir. 2003). Castner could testify at trial about what
 he witnessed. I therefore overrule Smith's hearsay objection to Castner's testimony. Smith's
 arguments about whether Castner is credible are not suitable for me to resolve at summary
 judgment. *See Dominguez-Curry v. Nev. Transp. Dep't*, 424 F.3d 1027, 1035 (9th Cir. 2005).

1 “popper” round), but the inmates did not stop fighting. *Id.* at 8, 32. Smith arrived at the top of
2 the stairs just as the popper round went off. *Id.* at 18.

3 Castro, Ramos, and Smith again ordered the inmates to the ground, but they did not
4 comply. *Id.* at 8, 18, 31-32. Perez and Arevalo continued to kick at each other, and Arevalo tried
5 to ram Perez with his shoulder. *Id.* at 18-19. According to inmate Castner, Castro and Smith
6 yelled at Ramos to shoot at the fighting inmates. ECF No. 175-8 at 4-5. Castro and Smith deny
7 that they told Ramos to shoot or otherwise signaled to him to shoot. ECF Nos. 146-2 at 68; 175-9
8 at 15; 176-5 at 11. However, they both admit that throughout the incident, they never told or
9 signaled Ramos not to shoot or to stop shooting. ECF Nos. 175-9 at 15; 176-5 at 11; 146-2 at 47
10 (Ramos testifying that he could not hear if anyone told him to stop but no one gave him a visual
11 cue to stop).

12 Within five to fifteen seconds of firing the popper round, Ramos fired a round of live
13 birdshot. ECF No. 146-2 at 8, 19, 32, 35. Ramos stated that he fired the first round “center
14 mass” (meaning at chest height) between the two inmates because he could not do a skip shot off
15 the ground based on his position relative to Perez and Arevalo. *Id.* at 36, 46. Ramos testified at
16 his deposition that he knew that shooting center mass with a live round constituted deadly force.
17 *Id.* at 37. Castro testified that Perez and Arevalo continued kicking each other even though one
18 or both must have been hit because Castro saw blood on at least one of the inmates’ lower legs.
19 *Id.* at 8. But according to inmate Castner, whose account differs from the correctional officers’
20 versions, Perez fell down face first after this first live round and did not move again. ECF No.
21 175-8 at 5.

22 According to the correctional officers, Castro and Ramos again ordered the inmates to the
23 ground, but Perez and Arevalo continued kicking, and within another five to twenty seconds,

1 Ramos fired a second live round of birdshot “center mass in between both of the inmates.” ECF
2 No. 146-2 at 39; *see also id.* at 8, 19, 32, 38. Castro saw more blood on the inmates’ lower legs,
3 but they nevertheless continued to kick at each other. *Id.* at 8; *see also id.* at 19 (Smith testifying
4 that the inmates continued to fight after the second live round). After the second live round,
5 Castro went to the office to retrieve gloves because he did not want to be contaminated with
6 anything if he was going to assist in separating the inmates once help arrived. *Id.* at 9.

7 About fifteen to twenty seconds after the second live round, Ramos fired a third live
8 round, again center mass between the two inmates. *Id.* at 39-40, 42. Castro heard the third shot
9 just as he was approaching the office. *Id.* at 9. While in the office, Castro called a lieutenant to
10 report that there were shots fired in unit 2A/B. *Id.*

11 According to Ramos, the inmates were still kicking and kneeling each other after the third
12 live round. *Id.* at 32. Perez then leaned on Arevalo and stated that he could not breathe, to which
13 Arevalo responded that he did not care. *Id.* at 32, 40. Castro came out of the office and saw both
14 Arevalo and Perez on the ground. *Id.* at 9. According to Castro, Arevalo was elbowing Perez in
15 the head. *Id.* Castro yelled at Arevalo to stop. *Id.* at 10. At this point, Castro saw blood on the
16 inmates’ entire bodies. *Id.* According to Smith, the third live round seemed to have some effect
17 on the inmates because although they were still moving, they “started slowing down,” and
18 Arevalo was on his knees while Perez was on the ground. *Id.* at 19.

19 Ramos was out of ammunition, so he retrieved more rounds in the bubble. *Id.* at 32.
20 According to Ramos, at this point, Perez was on his knees slumped forward, while Arevalo was
21 sitting but still kicking Perez. *Id.* at 32, 43. Ramos again told the inmates to stop or he would
22 shoot. *Id.* at 32. Ramos testified that Arevalo continued to kick Perez in the face, so he fired the
23 fourth live round between them. *Id.* at 10, 32, 43. Approximately 30 - 45 seconds passed

1 between the third and fourth live rounds. *Id.* at 42. After the fourth live shot, Arevalo ceased
2 hitting Perez and yelled out in some fashion to indicate he had been hit. *Id.* at 10-11, 32. At that
3 point, Ramos saw blood on both inmates. *Id.* at 43.

4 According to Castro, right after the fourth shot, several other correctional officers and
5 medical personnel arrived to help. *Id.* at 11, 68. Before other personnel arrived, Castro did not
6 provide any medical attention to Arevalo or Perez even though he could see that Perez was badly
7 injured. ECF No. 176-5 at 13. Correctional officer Dustin Mumpower arrived on the scene and
8 saw that no medical aid was being provided to the inmates. ECF Nos. 176-11 at 4; 176-12.
9 Mumpower noted that Perez was having difficulty breathing and he was gurgling, so Mumpower
10 turned him on his side and monitored his pulse until the medical staff arrived. ECF No. 176-12.
11 Medical staff arrived and performed CPR, but Perez died from his injuries. *Id.*; ECF No. 176-17.
12 His death certificate listed the cause of death as “multiple shotgun wounds of head, neck, chest
13 and arms.” ECF No. 146-2 at 47.⁴

14 Following the incident, Castro and Smith were placed on administrative leave pending an
15 investigation and both later resigned. ECF Nos. 146-2 at 12; 176-5 at 26; 175-9 at 18. Ramos
16 was terminated, charged criminally, and entered a plea agreement to resolve the charges. ECF
17 No. 176-11; *see also* ECF Nos. 147-6 at 17, 115; 159-10.

18 **II. LEGAL STANDARD**

19 Summary judgment is appropriate if the movant shows “there is no genuine dispute as to
20 any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P.
21 56(a). A fact is material if it “might affect the outcome of the suit under the governing law.”
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⁴ Arevalo lost an eye due to the shooting. ECF No. 146-2 at 46-47.

1 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute is genuine if “the evidence
2 is such that a reasonable jury could return a verdict for the nonmoving party.” *Id.*

3 The party seeking summary judgment bears the initial burden of informing the court of
4 the basis for its motion and identifying those portions of the record that demonstrate the absence
5 of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The
6 burden then shifts to the non-moving party to set forth specific facts demonstrating there is a
7 genuine dispute of material fact for trial. *Sonner v. Schwabe N. Am., Inc.*, 911 F.3d 989, 992 (9th
8 Cir. 2018) (“To defeat summary judgment, the nonmoving party must produce evidence of a
9 genuine dispute of material fact that could satisfy its burden at trial.”). I view the evidence and
10 reasonable inferences in the light most favorable to the non-moving party. *Zetwick v. Cnty. of*
11 *Yolo*, 850 F.3d 436, 440-41 (9th Cir. 2017).

12 **III. SECTION 1983⁵**

13 To establish liability under 42 U.S.C. § 1983, a plaintiff must show the deprivation of a
14 right secured by the Constitution and laws of the United States, and must show that the
15 deprivation was committed by a person acting under color of state law. *Broam v. Bogan*, 320
16 F.3d 1023, 1028 (9th Cir. 2003). The defendants do not contest that they acted under color of
17 state law. Thus, the dispute centers on whether they violated Perez’s constitutional rights.

18 The parties also dispute whether the defendants are entitled to qualified immunity. To
19 allay the “risk that fear of personal monetary liability and harassing litigation will unduly inhibit
20 officials in the discharge of their duties,” government officials performing discretionary
21 functions may be entitled to qualified immunity for claims made under § 1983. *Anderson v.*

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23 ⁵ I previously dismissed the § 1983 claims against the State of Nevada, and against Cox, Neven, Filson, and Oliver in their official capacities. ECF No. 107 at 12.

1 *Creighton*, 483 U.S. 635, 638 (1987). Qualified immunity protects “all but the plainly
2 incompetent or those who knowingly violate the law.” *Malley v. Briggs*, 475 U.S. 335, 341
3 (1986).

4 In ruling on a qualified immunity defense, I consider whether the evidence viewed in the
5 light most favorable to the nonmoving party shows the defendant’s conduct violated a
6 constitutional right. *Sorrels v. McKee*, 290 F.3d 965, 969 (9th Cir. 2002). If the plaintiff has
7 shown the defendant violated a constitutional right, I then must determine whether that right was
8 clearly established. *Id.* A right is clearly established if “it would be clear to a reasonable officer
9 that his conduct was unlawful in the situation he confronted.” *Wilkins v. City of Oakland*, 350
10 F.3d 949, 954 (9th Cir. 2003) (emphasis omitted) (quoting *Saucier v. Katz*, 533 U.S. 194, 202
11 (2001)). To show the right at issue is clearly established, “existing precedent must have placed
12 the statutory or constitutional question beyond debate.” *Kisela v. Hughes*, --- U.S. ----, 138 S. Ct.
13 1148, 1152 (2018) (quotation omitted). I make this second inquiry “in light of the specific
14 context of the case, not as a broad general proposition.” *Saucier*, 533 U.S. at 201. An officer will
15 be entitled to qualified immunity even if he was mistaken in his belief that his conduct was
16 lawful, so long as that belief was reasonable. *Wilkins*, 350 F.3d at 955.

17 **A. Excessive Force**

18 The Eighth Amendment to the United States Constitution prohibits “cruel and unusual”
19 punishment. U.S. Const. amend. VIII. “After incarceration, only the unnecessary and wanton
20 infliction of pain . . . constitutes cruel and unusual punishment forbidden by the Eighth
21 Amendment.” *Whitley v. Albers*, 475 U.S. 312, 319 (1986) (quotation omitted). To establish an
22 Eighth Amendment violation based on a use of force, a plaintiff must show the amount of force
23 used was more than de minimis or otherwise involved force “repugnant to the conscience of

1 mankind.” *Hudson v. McMillian*, 503 U.S. 1, 9-10 (1992) (quotation omitted). Additionally, the
2 plaintiff must show the prison official acted with a culpable state of mind. *Wilson v. Seiter*, 501
3 U.S. 294, 298-99 (1991).

4 When an Eighth Amendment claim is based on an allegation that a prison official used
5 excessive physical force, the culpable state of mind inquiry is “whether force was applied in a
6 good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm,”
7 rather than a deliberate indifference standard. *Hudson*, 503 U.S. at 6-7 (citing *Whitley*, 475 U.S.
8 at 320-21). “[P]rison administrators are charged with the responsibility of ensuring the safety of
9 the prison staff, administrative personnel, and visitors, as well as . . . the safety of the inmates
10 themselves.” *Whitley*, 475 U.S. at 320 (quotation omitted). Consequently, the deliberate
11 indifference standard “does not adequately capture the importance of such competing
12 obligations, or convey the appropriate hesitancy to critique in hindsight decisions necessarily
13 made in haste, under pressure, and frequently without the luxury of a second chance.” *Id.* The
14 court considers several factors in determining whether force was applied maliciously and
15 sadistically to cause harm, including:

16 (1) the extent of injury suffered by an inmate; (2) the need for application of
17 force; (3) the relationship between that need and the amount of force used; (4) the
18 threat reasonably perceived by the responsible officials; and (5) any efforts made
to temper the severity of a forceful response.

19 *Martinez v. Stanford*, 323 F.3d 1178, 1184 (9th Cir. 2003). The question is “whether the use of
20 force could plausibly have been thought necessary, or instead evinced such wantonness with
21 respect to the unjustified infliction of harm as is tantamount to a knowing willingness that it
22 occur.” *Whitley*, 475 U.S. at 321.

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1 1. Ramos

2 Ramos argues that he was justified in using the shotgun because some use of force was
3 necessary to break up the fight and the shotgun was the only means of force available to him
4 given his position relative to the fighting inmates and after lesser means, such as verbal
5 commands and firing the popper round, failed. Ramos contends that the level of force was
6 appropriate because if either inmate fell, he would be at risk of serious bodily injury or death
7 from the other inmate potentially stomping on him in a vulnerable position. Alternatively, he
8 contends he is entitled to qualified immunity.

9 The plaintiffs respond that Ramos resorted first to the shotgun instead of using other
10 means of control, such as calling for help or allowing the two floor officers to separate the
11 inmates. They contend that Ramos shot center mass at the two inmates despite his awareness
12 that this constituted deadly force. Finally, they contend that Ramos is not entitled to qualified
13 immunity.

14 Viewing the facts in the light most favorable to the plaintiffs, a reasonable jury could find
15 Ramos violated Perez's Eighth Amendment rights. Perez died from his injuries, so he suffered a
16 deprivation serious enough to constitute cruel and unusual punishment. As for whether Ramos
17 acted with a culpable state of mind, the level of force used was substantial. Perez sustained
18 multiple shotgun pellet wounds that caused his death within minutes. Although there was some
19 need to apply force to stop the fight, the inmates were handcuffed behind their backs wearing
20 only their underwear. A reasonable jury could conclude they could do little damage to each
21 other or to correctional officers if the officers tried to break up the fight. If the jury believes
22 Castner's version, the inmates were only tentatively kicking at each other's shins to avoid falling.
23 A reasonable jury could conclude in light of these circumstances that the need to resort to deadly

1 force was grossly excessive compared to the threat posed by two handcuffed inmates kicking at
2 each other's shins, and that no responsible correctional officer could have perceived a need to
3 shoot center mass between the two inmates four times. Indeed, if the jury believes Castner's
4 version, Perez was on the ground after the first live round, yet Ramos shot three more live rounds
5 in the chest area between the two inmates. Finally, although the correctional officers used verbal
6 commands and Ramos fired a popper round, a reasonable jury could find that Ramos resorted
7 almost immediately and repeatedly to deadly force with little time between each shot.

8 Ramos is not entitled to qualified immunity. The plaintiffs have pointed to case law that
9 existed before this incident that indicated that using deadly force in the form of a shotgun with
10 live rounds to restore prison order in a situation that does not call for the use of deadly force may
11 violate a prisoner's Eighth Amendment rights. *See Est. of Adams*, No. 96-16423, 133 F.3d 926,
12 1998 WL 4079 at *3 (9th Cir. Jan. 7, 1998) (finding no qualified immunity where the
13 correctional officer shot the inmate in the head and killed him in response to a fistfight between
14 prisoners where a reasonable jury could have concluded the fight "did not pose a significant
15 danger to either prisoner"); *Robins v. Meecham*, 60 F.3d 1436, 1438, 1441-42 (9th Cir. 1995)
16 (holding a reasonable jury could find an Eighth Amendment violation where the correctional
17 officer used a shotgun on an inmate refusing to lockdown as ordered and the plaintiff was injured
18 by the pellets). I therefore deny Ramos's motion for summary judgment on the Eighth
19 Amendment claim against him.

20 2. Castro and Smith

21 Castro and Smith argue that they did not use any force on Perez, so they cannot be liable
22 for excessive force. They contend that they intervened by shouting commands, but they did not
23 have to intervene physically because that would have subjected them to the risks of the inmates

1 attacking them or being hit by birdshot. Smith argues he could not have intervened before the
2 shooting because he was not upstairs at that time. Both defendants assert that they had no time
3 to intervene because Ramos started shooting within seconds of the fight beginning. They also
4 argue that Ramos's unforeseeable, intentional conduct of shooting at the inmates center mass
5 cuts off the chain of causation for their acts or omissions. Alternatively, they contend that they
6 are entitled to qualified immunity.

7 The plaintiffs respond that Castro and Smith could have physically intervened before
8 Ramos fired the first round or between the third and fourth live rounds when there was a delay
9 because Ramos had to reload. They also contend that Castro and Smith could have intervened
10 by telling or signaling Ramos to stop shooting. And they dispute that either defendant is entitled
11 to qualified immunity.

12 Correctional officers "can be held liable for failing to intercede in situations where
13 excessive force is claimed to be employed by other officers only if 'they had an opportunity to
14 intercede.'" *Hughes v. Rodriguez*, 31 F.4th 1211, 1223 (9th Cir. 2022) (quoting *Cunningham v.*
15 *Gates*, 229 F.3d 1271, 1289-90 (9th Cir. 2000)).

16 Viewing the facts in the light most favorable to the plaintiffs, a reasonable jury could find
17 Castro and Smith liable for failure to intervene. A reasonable jury could conclude that they
18 could have intervened by separating the handcuffed inmates before the first shot was fired, but
19 instead they told Ramos to shoot in a situation that did not call for deadly force. A reasonable
20 jury also could find that Castro and Smith could have intervened between the third and fourth
21 shots when Ramos paused to reload. And a reasonable jury could conclude that the officers
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1 could have intervened by signaling Ramos to stop shooting, particularly if a jury believes
 2 Castner's testimony that Perez was on the ground after the first live round.⁶

3 As to whether Ramos's conduct was an intervening cause that cuts off liability, Castner
 4 testified that Castro and Smith shouted at Ramos to shoot at the inmates. A reasonable jury
 5 could conclude that these defendants knew that a skip shot was not an option based on the
 6 inmates' positioning and that by telling Ramos to shoot, they were encouraging the use of deadly
 7 force. Whether Ramos's decision to shoot center mass under these facts was so unforeseeable
 8 and abnormal as to be an intervening cause relieving Castro and Smith of liability is a question
 9 for the jury. *See White v. Roper*, 901 F.2d 1501, 1506 (9th Cir. 1990) (stating that determining
 10 whether an intervening act was unforeseeable and abnormal are issues of fact for the jury "[i]f
 11 reasonable persons could differ").

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 14 ⁶ In reply, Smith argues that the plaintiffs are newly raising at summary judgment the theory that
 15 he failed to intervene by not signaling Ramos to stop shooting. He also contends that, in any
 16 event, there is no evidence that Perez would have survived if he had told Ramos to stop shooting
 because it is unknown which shot killed Perez and there is no evidence that Ramos would have
 heeded a direction to stop.

17 Under Federal Rule of Civil Procedure 8, the complaint's allegations must "give the
 18 defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Pac.*
Coast Fed'n of Fishermen's Ass'ns v. Glaser, 945 F.3d 1076, 1086 (9th Cir. 2019) (quotation
 19 omitted). "A party need not plead specific legal theories in the complaint, so long as the other
 side receives notice as to what is at issue in the case." *Id.* (quotation omitted).

20 The amended complaint alleges that Castro and Smith failed to intervene or call for
 21 medical help, and instead yelled at Ramos to shoot the inmates. ECF No. 75 at 5, 7, 12-13, 16-
 22 17. Castro and Smith were questioned at their depositions regarding whether they told Ramos to
 23 stop shooting. ECF Nos. 175-5 at 9-10; 175-9 at 15-16; *see also* ECF No. 178-30 at 29 (expert
 report opining that Smith and Castro were senior officers to Ramos and should have directed
 Ramos to cease fire). Smith and Castro had fair notice of the alleged basis for their liability. A
 reasonable jury could conclude that Ramos would have obeyed cease fire commands from a
 more senior officer. Finally, what harm Perez suffered as a result of officer inaction or particular
 shots is a matter for the jury to resolve, as even nominal damages are an option. *See Guy v. City*
of San Diego, 608 F.3d 582, 587-88 (9th Cir. 2010).

1 Finally, Castro and Smith are not entitled to qualified immunity for the same reasons as
2 Ramos, and because an officer's potential liability based on a failure to intervene was clearly
3 established long before this incident. *See Cunningham*, 229 F.3d at 1289-90; *Robins*, 60 F.3d at
4 1442. Consequently, I deny Castro's and Smith's motions for summary judgment on the Eighth
5 Amendment claim.

6 3. Supervisory Defendants

7 I previously dismissed the excessive force claim against Cox, Neven, Filson, and Oliver
8 in their individual capacities to the extent that claim is based on either a ratification theory or on
9 the "pitch and catch" custom in HDSP. ECF No. 107 at 12. But I allowed this claim to proceed
10 against these defendants⁷ based on allegations that they encouraged the unnecessary use of
11 shotguns loaded with birdshot to control inmates even when lesser means of force were
12 available. *Id.* at 6-8.

13 The supervisory defendants argue that HDSP's written policies allowing the use of
14 shotgun skip-shots are not unconstitutional as written. They also argue there was no alleged
15 policy of skip-shooting birdshot as a primary means to control inmates and, even if there was,
16 that was not the moving force behind Perez's death because Ramos admitted he did not use the
17 shotgun in the manner he was trained to and instead shot center mass at the inmates. The
18 supervisory defendants argue there is no evidence they subjectively knew that the use-of-force
19 policies posed an excessive risk to inmates. They contend that a single incident cannot support a
20 deliberate indifference claim. Finally, they argue that they are entitled to qualified immunity.

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23 ⁷ The plaintiffs do not present argument or point to evidence that Oliver is liable on this or any
other claim. Indeed, they concede dismissal of their deliberate indifference claim against Oliver.
ECF No. 178 at 22. I therefore grant summary judgment in Oliver's favor on all claims.

1 The plaintiffs respond that the de facto policy that encouraged resorting to a shotgun even
2 in nondeadly force situations was a moving force behind the violation. They note that a report
3 on NDOC's policies and practices found those policies did not meet best practices, and the report
4 concluded correctional staff often went from verbal warnings to using a shotgun without lesser
5 means of intervention. The plaintiffs argue that the supervisory defendants agreed that a lack of
6 staff resources and safety equipment necessitated the use of a shotgun as the default means of
7 controlling inmates, and they were aware that birdshot caused injuries. They argue that given the
8 lack of other available options to control inmates (such as batons or stun guns), the staff defaults
9 to using birdshot even in situations that do not call for that level of force. They also note that
10 NDOC policy defined birdshot as nondeadly force even though the defendants knew it could and
11 did cause substantial bodily injury in other instances, and the policy did not define using birdshot
12 as deadly force when it could not be skipped.

13 A supervisory official may be liable under § 1983 if either he is personally involved in
14 the constitutional deprivation or there is a "sufficient causal connection between the supervisor's
15 wrongful conduct and the constitutional violation." *Starr v. Baca*, 652 F.3d 1202, 1207 (9th Cir.
16 2011) (quotation omitted). As to this second means of holding a supervisor liable, the "causal
17 connection can be established by setting in motion a series of acts by others or by knowingly
18 refusing to terminate a series of acts by others, which the supervisor knew or reasonably should
19 have known would cause others to inflict a constitutional injury." *Id.* at 1207-08 (simplified). A
20 supervisor thus may "be liable in his individual capacity for his own culpable action or inaction
21 in the training, supervision, or control of his subordinates; for his acquiescence in the
22 constitutional deprivation; or for conduct that showed a reckless or callous indifference to the
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1 rights of others.” *Rodriguez v. Cnty. of L.A.*, 891 F.3d 776, 798 (9th Cir. 2018) (quotation
2 omitted).

3 Viewing the evidence in the light most favorable to the plaintiffs, a reasonable jury could
4 find that Cox, Neven, and Filson knew about a custom and practice of using shotguns loaded
5 with birdshot as the primary means of controlling inmates regardless of the level of the threat due
6 to low-level staffing at the prison, and that they were subjectively aware of the risk of substantial
7 injury to inmates as a result.⁸ A reasonable jury could conclude that this custom and practice of

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10 ⁸ See, e.g., ECF Nos. 178-24 at 6-8 (Filson testifying that correctional officers at HDSP did not
11 have access to other means of control such as pepper spray or tasers); *id.* at 14-15 (Filson
12 testifying that he knew birdshot caused injuries and was aware that birdshot was often used at
13 HDSP to control inmates); *id.* at 16 (Filson agreeing with the Association of State Correctional
14 Administrators (ASCA) report that HDSP operates at very low staffing levels, so it relies heavily
15 on the use of shotguns); 178-25 at 13-14 (Neven and associate warden engage in firearms review
16 to determine whether any discharge was within policy); 178-26 at 9 (ASCA report showing
17 HDSP had 48 incidents of birdshot being fired between 2012 and 2014, nearly five times the
18 number of the next highest facility); *id.* at 13 (stating that NDOC “operates at very low staffing
19 levels” so “it relies heavily on the use of shotguns to protect inmates and staff from harm”); *id.* at
20 14 (stating that the lack of staff has “placed the Department in the position of relying heavily and
21 almost exclusively [on] the use of weapons to maintain order”); *id.* at 15 (describing staff as
22 “confirm[ing] that controlling inmates went from verbal to the shotgun with little or no physical
23 intervention by floor staff”); *id.* at 20 (noting that because the shotgun is the only control device
readily available, “staff rely on the shotgun to control inmates and to break up fights between
inmates”); 178-27 at 5 (Cox testifying that the only nondeadly force equipment readily available
to a correctional officer in the bubble is the shotgun); 178-28 (NDOC Administrative Regulation
405 defining as nondeadly force a shotgun loaded with birdshot “designed to skip shoot the
birdshot into the offender(s) and striking the offender(s) in their lower extremities to temporarily
incapacitate or immobile the offender(s)”; 147-3 at 35-36 (Castro testifying that because officers
had no intermediate equipment, officers would go from verbal commands and handcuffs to
birdshot); 157 at 154 (Neven testifying that he reviewed all incidents at HDSP); *id.* at 158
(Neven agreeing with the ASCA report that due to low staffing levels, HDSP relies heavily on
the use of shotguns); 193-5 at 4 (Cox testifying that he was aware of a prior incident where an
inmate sustained substantial bodily injury from birdshot); 178-30 at 13 (recounting Cox’s
testimony agreeing that low staffing made resorting to the shotgun the default means of
controlling inmates); *id.* (stating that Filson believed birdshot was not the best practice and he
tried to avoid sitting on review committees so as not to disagree with the use); 193-5 at 3 (Cox
testifying that the Inspector General’s office had recommended in one instance that the use of
birdshot was outside policy).

1 using birdshot against unarmed inmates set in motion Ramos's resorting to the shotgun where
 2 deadly force was not justified.⁹ The defendants are not entitled to qualified immunity because
 3 the law prior to this incident clearly established both supervisory liability, and an inmate's
 4 Eighth Amendment right to not be subjected to deadly force with live shotgun rounds to restore
 5 prison order in situations that do not call for the use of deadly force. *See Starr*, 652 F.3d at 1207;
 6 *Est. of Adams*, 1998 WL 4079, at *3; *Robins*, 60 F.3d at 1438, 1441-42; *see also Perez v. Cox*,
 7 788 F. App'x 438, 444 (9th Cir. 2019) (rejecting these defendants' request for qualified
 8 immunity at the dismissal stage of this case). I therefore deny the supervisory defendants'
 9 motion for summary judgment on this claim.

10 **B. Deliberate Indifference to Serious Medical Needs**¹⁰

11 To "prevail on an Eighth Amendment claim for inadequate medical care, a plaintiff must
 12 show deliberate indifference to his serious medical needs." *Colwell v. Bannister*, 763 F.3d 1060,
 13 1066 (9th Cir. 2014) (quotation omitted). A plaintiff must show that (1) "the deprivation
 14 was serious enough to constitute cruel and unusual punishment" and (2) the defendant was
 15 deliberately indifferent. *Id.* (quotation omitted). A prison official is deliberately indifferent "only
 16 if the official knows of and disregards an excessive risk to inmate health and safety." *Id.*
 17 (quotation omitted). "[T]he official must both be aware of facts from which the inference could
 18 be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Id.*

19 ⁹ *See, e.g.*, ECF Nos. 178-24 at 10 (Filson testifying that birdshot was listed as nondeadly force);
 20 *id.* at 13 (Filson testifying that there is no direction in the policy for firing birdshot when it
 21 cannot be skipped); 178-25 (Neven testifying that birdshot was listed as nondeadly force because
 22 it is designed to be skip shot but acknowledging it could constitute deadly force); 178-6 at 8-9
 23 (report by ASCA stating that officers were unsure about what was appropriate when birdshot
 could not be skip shot); 178-26 at 14 (ASCA report stating that officers were reluctant to
 physically intervene in a fight between inmates because they were afraid of being hit by
 birdshot).

¹⁰ I previously dismissed this claim against Cox, Neven, and Filson. ECF No. 107 at 12.

1 (quotation omitted). Deliberate indifference “may appear when prison officials deny, delay or
2 intentionally interfere with medical treatment, or it may be shown by the way in which prison
3 physicians provide medical care.” *Id.* (quotation omitted).

4 1. Ramos

5 There is no genuine dispute that Ramos was not physically close to the inmates. The
6 plaintiffs do not identify what aid he could have rendered before medical personnel arrived and
7 do not argue that he was deliberately indifferent to Perez’s medical needs following the shooting.
8 I therefore grant summary judgment in Ramos’s favor on this claim.

9 2. Castro and Smith

10 Castro argues that he believed medical assistance had already been summoned and would
11 arrive soon. Smith argues that he summoned aid and needed to do no more than that. Both
12 contend that there is no evidence that they could have provided any assistance that would have
13 saved Perez or reduced his pain. Finally, they assert that they are entitled to qualified immunity.

14 The plaintiffs respond that Perez was bleeding and gurgling, yet Castro and Smith did
15 nothing to assist him. They contend that a reasonable jury could find that failing to provide
16 medical attention to someone who had sustained numerous shotgun wounds would cause the
17 injured person to suffer the unnecessary and wanton infliction of pain. Finally, they argue that
18 Castro and Smith are not entitled to qualified immunity.

19 A reasonable jury could find Castro and Smith were deliberately indifferent to Perez’s
20 serious medical needs. There is no dispute that Perez was bloody and nonresponsive after the
21 shooting, that he stopped breathing shortly after medical personnel arrived, and that he
22 subsequently died from his injuries. The deprivation thus was serious enough to constitute cruel
23 and unusual punishment. A reasonable jury could find that Castro and Smith, who were trained

1 in CPR and observed Perez covered in blood, were deliberately indifferent because they knew of
2 and disregarded an excessive risk to inmate health and safety when they took no action to assist
3 Perez. *See* ECF Nos. 147-3 at 26 (Castro testifying that he was trained in CPR but did not render
4 aid); 147-4 at 29-30 (Smith testifying that he was trained in CPR but did not take any action to
5 assist Perez); *id.* at 45 (Smith testifying that he asked Perez if he was okay and Perez did not
6 respond). Another correctional officer, Dustin Mumpower, arrived on the scene and saw Perez
7 was receiving no assistance. ECF No. 176-11 at 3-4. Mumpower noted that Perez was short of
8 breath and gurgling. ECF No. 176-12. In contrast to Castro and Smith's actions, Mumpower
9 turned Perez on his side to open Perez's airway and monitored Perez's breathing and pulse until
10 medical personnel arrived. *Id.* What harm Perez suffered as a result of Castro and Smith doing
11 nothing to assist him before Mumpower and the medical personnel arrived is a matter for the jury
12 to resolve, as even nominal damages are available. *See Guy v. City of San Diego*, 608 F.3d 582,
13 587-88 (9th Cir. 2010).

14 Castro and Smith are not entitled to qualified immunity. The Ninth Circuit already ruled
15 with respect to Oliver that a reasonable official would have known that he would violate an
16 inmate's Eighth Amendment rights if he observed an inmate bleeding from shotgun wounds and
17 did nothing to assess the inmate's needs or attempt to stop the bleeding. *Perez*, 788 F. App'x at
18 445. Consequently, I deny Castro's and Smith's motions for summary judgment on the claim for
19 deliberate indifference to medical needs.

20 ////

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1 **C. Familial Association**

2 The defendants argue that S.E.P. and A.I.P. lack standing to assert their claims for loss of
3 familial association because they are not Perez’s children or heirs.¹¹ The defendants argue that a
4 paternity test shows that S.E.P. is not Perez’s biological child, there is no evidence that A.I.P. is
5 Perez’s biological child, and there is no evidence Perez welcomed the children into his home and
6 supported them prior to his death.

7 The plaintiffs respond that the defendants do not have standing to challenge the
8 children’s paternity. They argue that parentage is not determined solely by biology and that
9 several other factors show Perez held out the children as his own and intended to maintain a
10 parent-child relationship with them upon his release from custody. They note that A.I.P.’s last
11 name is Perez, an application to add A.I.P.’s father’s name identified Perez as the father, and the
12 children’s mother identified Perez as the father in an affidavit in support of the children being
13 placed with Victor and Michele Perez as guardians. The plaintiffs contend that Perez would
14 have signed the same affidavit, but he did not have his identification with him so the notary
15 would not notarize his signature.

16 “A plaintiff must demonstrate standing for each claim he or she seeks to press and for
17 each form of relief sought.” *Washington Env’t Council v. Bellon*, 732 F.3d 1131, 1139 (9th Cir.
18 2013). To establish standing at the summary judgment stage, the plaintiff “must set forth by

19
20 ¹¹ Castro challenges only S.E.P.’s standing. ECF No. 146 at 3, 16-19, 25. Ramos does not
21 challenge standing. ECF No. 147. Smith and the supervisory defendants challenge both
22 children’s standing. ECF Nos. 153 at 4-7; 159 at 8-9. Standing is an Article III jurisdictional
23 requirement. *Renee v. Duncan*, 686 F.3d 1002, 1012 (9th Cir. 2012). Consequently, I must
address each minor child’s standing for each of their claims against the defendants, even if a
particular defendant did not challenge standing. For this same reason, it does not matter that the
defendants raised the standing issue late in the case. “Lack of Article III standing is a non-
waivable jurisdictional defect that may be raised at any time, even on appeal after failing to raise
it in the district court.” *Id.*

1 affidavit or other evidence specific facts, which for purposes of the summary judgment motion
2 will be taken to be true.” *Id.* (simplified).

3 “A decedent’s parents and children generally have the right to assert substantive due
4 process claims under the Fourteenth Amendment.” *Wheeler v. City of Santa Clara*, 894 F.3d
5 1046, 1057-58 (9th Cir. 2018). “Judicially enforceable Fourteenth Amendment interests require
6 enduring relationships reflecting an assumption of parental responsibility and stem from the
7 emotional attachments that derive from the intimacy of daily association, and from the role it
8 plays in promoting a way of life through the instruction of children.” *Id.* (simplified).
9 Consequently, “even biological parents must maintain consistent involvement in a child’s life
10 and participation in child-rearing activities for their relationship to be entitled to the Fourteenth
11 Amendment protections” for loss of familial relationships. *Id.* (holding that a child who was
12 legally adopted as an infant had no standing to assert a loss of familial relationship claim under
13 the Fourteenth Amendment for the death of his biological mother); *see also Kirkpatrick v. Cnty.*
14 *of Washoe*, 843 F.3d 784, 789 (9th Cir. 2016) (stating that “parental rights do not spring full-
15 blown from the biological connection between parent and child” (simplified)).

16 Based on S.E.P.’s date of birth and Perez’s dates of incarceration, Perez could not be
17 S.E.P.’s biological father. ECF No. 157 at 37, 66-67, 104. And DNA testing confirmed that
18 another individual was S.E.P.’s biological father. *Id.* at 66-67, 104. When A.I.P. was born, his
19 mother was married to another man. *Id.* Approximately a month before A.I.P. was born, Perez
20 filled out a form for government benefits in which he denied, under penalty of perjury, that he
21 lived with anyone else, including any unborn children. *Id.* at 70-71, 134. There is no evidence of
22 a genetic test showing who is A.I.P.’s biological father.
23

1 Prior to Perez's incarceration, the children lived at Perez's mother's house. ECF No. 159-
2 9 at 45. Before Perez went to prison, he asked his brother Victor Perez and Victor's wife
3 Michele to pick up the children and care for them. *Id.* at 46. A few months after Perez went to
4 HDSP, Victor and Michele applied for temporary guardianship over A.I.P. and S.E.P. ECF No.
5 146-2 at 91. They subsequently petitioned to terminate Perez's and the mother's parental rights.
6 *Id.* at 95, 98-105. In that petition, Victor and Michele stated under oath that Perez "has displayed
7 conduct evincing a settled purpose to forego all custody and relinquish all claims as evidenced
8 by" him signing a consent to terminate his parental rights. *Id.* at 100; *see also id.* at 93, 105. The
9 petition further stated that Perez had "abandoned the minor children by leaving [them] in the care
10 and custody of [Victor and Michele] without provision for the children's support and without
11 communication with the minor children for a period of more than 6 months." *Id.* at 100. And
12 Victor and Michele averred that Perez was "unfit" as a parent because he "failed to provide the
13 minor children with proper care, guidance and support," and Perez had not made "even token
14 efforts" to "support or communicate with the children." *Id.* Victor confirmed at his deposition
15 that the statements in the petition were true at the time the petition was filed. *Id.* at 95. Perez
16 died before the court ruled on the termination of his parental rights, so that court found that
17 issues related to his parental rights were moot. ECF No. 178-15 at 4.

18 Under these facts, the children lack a familial relationship with Perez that is entitled to
19 Fourteenth Amendment protections as a matter of law. Perez is not S.E.P.'s biological parent
20 and there is no evidence he is A.I.P.'s biological parent either. More importantly, there is no
21 evidence that Perez maintained consistent involvement in the children's lives or participated in
22 child-rearing activities. To the contrary, he consented to the termination of the parent-child
23 relationship. The children thus have no standing to assert a loss of familial relationship claim

1 under the Fourteenth Amendment. I grant the defendants' summary judgment motions on the
2 loss of familial relationship claim.

3 **IV. STATE LAW CLAIMS**

4 **A. Wrongful Death**

5 The defendants argue S.E.P. and A.I.P. lack standing to assert a wrongful death claim.
6 The defendants also argue they did not wrongfully cause Perez's death. Alternatively, they
7 assert that they are entitled to discretionary immunity.

8 1. Standing

9 The defendants argue that S.E.P. and A.I.P. lack standing to assert a wrongful death claim
10 because they are not Perez's children or heirs for the same reasons discussed with respect to the
11 familial association claim. The plaintiffs oppose on the same grounds. They also argue Nevada
12 law determines parentage and testamentary intent based on more than biology. Finally, the
13 plaintiffs contend that the defendants lack standing to challenge their status as Perez's children
14 under Nevada's parentage laws.

15 Nevada provides that a wrongful death claim may be brought by both the decedent's
16 personal representative and the decedent's heirs. Nev. Rev. Stat. § 41.085(2). The statute defines
17 "heirs" as "a person who, under the laws of this State, would be entitled to succeed to the
18 separate property of the decedent if the decedent had died intestate." Nev. Rev. Stat. § 41.085(1).
19 Under Nevada's intestacy laws, if the decedent has children but no surviving spouse, then the
20 estate goes to the children. Nev. Rev. Stat. § 134.090. A child "includes a person entitled to take
21 as a child by intestate succession from the parent whose relationship is involved and excludes a
22 person who is a stepchild, a foster child, a grandchild or any more remote descendant." Nev.
23 Rev. Stat. § 132.055.

1 Nevada looks to its Parentage Act to determine a child’s “right to an inheritance.” *In re*
 2 *Est. of Murray*, 344 P.3d 419, 422-24 (Nev. 2015) (stating that “paternity contests in intestacy
 3 proceedings are governed by the Nevada Parentage Act,” including that Act’s standing and time
 4 limitation requirements). The Parentage Act defines the parent-child relationship as “the legal
 5 relationship existing between a child and his or her natural or adoptive parents incident to which
 6 the law confers or imposes rights, privileges, duties and obligations.” Nev. Rev. Stat. § 126.021.
 7 Nevada law does not “preclude a determination by a court that a child has such a legal
 8 relationship with more than two persons.”¹² *Id.*

9 Consistent with the “principle [sic] goal of intestacy law” to “effectuate the decedent’s
 10 likely intent in the distribution of his property,” “a determination of parentage rests upon a wide
 11 array of considerations rather than genetics alone.” *In re Est. of Murray*, 344 P.3d 419, 422, 424
 12 (quotation omitted). For example, a man is presumed to be a child’s father if he receives the
 13 minor child “into his home and openly holds out the child as his natural child.” Nev. Rev. Stat.
 14 § 126.051(1)(d).

17 ¹² The supervisory defendants move for leave to file supplemental authority because the Supreme
 18 Court of Nevada recently addressed the Parentage Act and the conclusive presumption of
 19 parentage that comes from a DNA test. *See Rosie M. v. Ignacio A.*, No. 83023, 138 Nev. Adv.
 20 Op. 49, 2022 WL 2375738 (Nev. 2022) (en banc). However, *Rosie M.* decided only that a
 21 putative father could conclusively establish the parent-child relationship with a DNA test. *See id.*
 22 at *3-4. It specifically did not address whether another man could also be deemed the child’s
 23 father. *See id.* at *3 n.3 (“As of June 2021, Nevada law recognizes that a child may have a legal
 ‘parent and child relationship’ with more than two persons. *See* 2021 Nev. Stat., ch. 512, § 3, at
 3404 (amending NRS 126.021(3) to include the following language: ‘This subsection does not
 preclude a determination by a court that a child has such a legal relationship with more than two
 persons.’). The district court rendered its decision before this statute’s effective date, and the
 parties do not address it on appeal.”). Consequently, *Rosie M.* does not preclude the possibility
 that Perez could be deemed S.E.P.’s father under the Parentage Act even though DNA testing
 shows another man was her biological father.

1 The Parentage Act limits who may challenge paternity. Under § 126.071(1), a “child,
 2 his or her natural mother, a man presumed or alleged to be his or her father or an interested third
 3 party may bring an action pursuant to this chapter to declare the existence or nonexistence of the
 4 father and child relationship.” The Supreme Court of Nevada has interpreted “an interested third
 5 party” to exclude relatives who sought to establish the nonexistence of a parent-child relationship
 6 to disinherit the decedent’s presumptive child in a probate proceeding. *In re Estate of Murray*,
 7 344 P.3d at 423-24. The court relied on cases from other states “for the proposition that third
 8 parties should not be allowed to challenge presumptive legitimacy, at least when established by
 9 acknowledgment, agreement, or decree.” *Id.* at 424.

10 Although Article III standing is a matter of federal law, in this instance, Nevada state law
 11 defines who has standing as an heir to bring a wrongful death claim. Under Nevada law, that
 12 question is resolved through the Parentage Act and its presumptions. And once a parent-child
 13 relationship presumptively exists, only certain individuals have standing to challenge it, which
 14 would not include these defendants. Thus, the question is whether either child is presumptively
 15 Perez’s.

16 Viewing the facts in the light most favorable to the plaintiffs, a reasonable jury could find
 17 that S.E.P. and A.I.P. are presumptively Perez’s children because he received them into his home
 18 and openly held them out as his own. The plaintiffs have presented evidence that Perez held
 19 both children out as his own. *See* ECF Nos. 176-22; 176-23; 178-3 at 6-8, 10; 178-4 at 3-4; 178-
 20 11; 178-12 at 2-3.¹³ And there is at least some evidence that Perez and the children lived

21
 22 ¹³ In their reply, the supervisory defendants contend the plaintiffs cannot rely on some of this
 23 evidence because the plaintiffs did not identify these exhibits in response to requests for
 admissions and production regarding the factual basis for the assertion that A.I.P. is Perez’s
 natural child. ECF No. 193 at 9-10. The defendants did not move for relief under Federal Rule
 of Civil Procedure 37. I decline to resolve the issue in the absence of a properly filed motion to

1 together before his incarceration, that he contributed to the children's upbringing, and that he
2 hoped to do so again upon his release from prison. *See* ECF Nos. 157 at 76-77; 175-3 at 3; 175-
3 20 at 4; 178-9 at 5, 7; 178-10 at 5. A reasonable jury could find that Perez was homeless and
4 then incarcerated, and thus was unable to significantly contribute financially or live with S.E.P.
5 and A.I.P. for long before his incarceration, but that he considered them his children and would
6 have wanted them to inherit from him. Although a reasonable jury also could find otherwise,
7 given his lack of support and his consent to the children's adoption, these are issues for the jury
8 to resolve. I therefore deny the defendants' motion for summary judgment on standing grounds.

9 2. Merits

10 Nevada Revised Statutes § 41.085(2) provides a cause of action "[w]hen the death of any
11 person . . . is caused by the wrongful act or neglect of another" The defendants raise the
12 same arguments about why their conduct was not wrongful or did not cause Perez's death. As
13 discussed above with respect to the Eighth Amendment claim, genuine disputes remain about the
14 wrongfulness of each defendant's conduct and whether it caused Perez's death.

15 Ramos, Smith, and Castro are not entitled to discretionary immunity for their actions
16 because their decisions about what force to use and whether to intervene were not grounded in
17 social, economic, or policy considerations. *See Est. of Brenes v. Las Vegas Metro. Police Dep't*,
18 No. 78272, 468 P.3d 368, 2020 WL 4284335, at *1 (Nev. 2020) (holding that a police officer
19 was not entitled to discretionary immunity for his "on-the-spot decision to use lethal force").

20 The supervisory defendants also are not entitled to discretionary immunity because they
21 do not have discretion to violate the Constitution. *See Koiro v. Las Vegas Metro. Police Dep't*,
22

23 _____
which the plaintiffs would have an opportunity to respond. But even if I ignored the exhibits to
which the defendants object, there is sufficient evidence to raise a triable dispute.

69 F. Supp. 3d 1061, 1074 (D. Nev. 2014) (citing *Mirmehdi v. United States*, 689 F.3d 975, 984 (9th Cir. 2011); *Nurse v. United States*, 226 F.3d 996, 1002 (9th Cir. 2000)). As discussed above, a reasonable jury could find that the supervisory defendants knew of and were deliberately indifferent to a de facto policy and practice of staff using shotguns as the primary means of controlling unarmed inmates, resulting in the use of deadly force in nondeadly force situations in violation of the Eighth Amendment. The supervisory defendants therefore are not entitled to discretionary immunity for this claim. See *Nurse*, 226 F.3d at 1002 (denying immunity on a Federal Tort Claims Act claim¹⁴ where the complaint alleged that “the policy-making defendants promulgated discriminatory, unconstitutional policies which they had no discretion to create”).

B. Negligent Training and Supervision¹⁵

In Nevada, an employer “has a duty to use reasonable care in the training, supervision, and retention of his or her employees to make sure that the employees are fit for their positions.” *Hall v. SSF, Inc.*, 930 P.2d 94, 99 (Nev. 1996). This claim against Cox and Neven is based on the “pitch and catch” custom or practice at HDSP, as well as the policy regarding the use of shotguns discussed above. ECF No. 107 at 10.

Cox and Neven argue, among other things, that they are entitled to discretionary immunity. Decisions about how to properly train and supervise officers are entitled to discretionary immunity because they involve individual judgment on the part of the policymakers or supervisors and are based on considerations of social, economic, or political

¹⁴ The Supreme Court of Nevada looks to federal law under the Federal Tort Claims Act for guidance on discretionary immunity. See *Martinez v. Maruszczak*, 168 P.3d 720, 727-28 (Nev. 2007) (en banc).

¹⁵ I previously dismissed the negligent retention claim. ECF No. 107 at 12.

1 policy. *Paulos v. FCHI, LLC*, 456 P.3d 589, 595 (Nev. 2020) (en banc) (holding that a police
2 department’s hiring and training decisions are subject to discretionary immunity). The plaintiffs
3 respond that I should follow *Scott v. Las Vegas Metropolitan Police Department*, which held that
4 a police department was not entitled to discretionary immunity for its alleged failure to train its
5 officers with respect to unlawful seizures and the use of excessive force. Case No. 2:10-cv-
6 01900-ECR-PAL, 2011 WL 2295178, at *10-11 (D. Nev. June 8, 2011). I decline to do so
7 because that decision predates *Paulos*, and because “the great weight of authority in this district
8 holds that discretionary immunity applies to decisions relating to the hiring, training, and
9 supervision of employees.” *Gardner v. City of Las Vegas*, No. 2:16-cv-01384-GMN-CWH, 2017
10 WL 3087276, at *4 (D. Nev. July 20, 2017). Cox and Neven are entitled to summary judgment
11 on this claim.

12 C. IIED¹⁶

13 The defendants generally argue that their conduct was not extreme and outrageous or
14 done with intent to cause emotional distress; there is no evidence the children or Perez suffered
15 extreme emotional distress; the children lack standing; and the defendants are entitled to
16 discretionary immunity.

17 Under Nevada law, an intentional infliction of emotional distress (IIED) claim requires
18 three elements: “(1) extreme and outrageous conduct with either the intention of, or reckless
19 disregard for, causing emotional distress, (2) the plaintiff’s having suffered severe or extreme
20 emotional distress and (3) actual or proximate causation.” *Dillard Dep’t Stores, Inc. v. Beckwith*,
21 989 P.2d 882, 886 (Nev. 1999) (en banc) (quotation omitted). “[E]xtreme and outrageous
22

23 ¹⁶ I previously dismissed this claim to the extent it was based on the “pitch and catch” practice.
ECF No. 107 at 12.

1 conduct is that which is outside all possible bounds of decency and is regarded as utterly
 2 intolerable in a civilized community.” *Maduikie v. Agency Rent-A-Car*, 953 P.2d 24, 26 (Nev.
 3 1998) (quotation omitted). However, “persons must necessarily be expected and required to be
 4 hardened to occasional acts that are definitely inconsiderate and unkind.” *Id.* (omission and
 5 quotation omitted); *see also* Restatement (Second) of Torts § 46 cmt. d (“The liability clearly
 6 does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other
 7 trivialities.”).

8 The Supreme Court of Nevada has referred to the Restatement (Second) of Torts § 46 as
 9 relevant authority for IIED claims under Nevada law. *See, e.g., Olivero v. Lowe*, 995 P.2d 1023,
 10 1026-27 (Nev. 2000); *Selsnick v. Horton*, 620 P.2d 1256, 1257 (Nev. 1980). That section does
 11 not refer specifically to prison officials, but the comments state that a police officer’s conduct
 12 may rise to the level of extreme and outrageous when he engages in an “extreme abuse” of his
 13 position. Restatement (Second) of Torts § 46, cmts. The comments offer examples of when a
 14 police officer’s conduct may be so outrageous as to support an IIED claim, such as when the
 15 officer attempts to extort money by a threat of arrest or attempts to extort a confession by falsely
 16 telling the accused her child has been injured in an accident and she cannot go to the hospital
 17 until she confesses. *Id.* “The Court determines whether the defendant’s conduct may be regarded
 18 as extreme and outrageous so as to permit recovery, but, where reasonable people may differ, the
 19 jury determines whether the conduct was extreme and outrageous enough to result in liability.”
 20 *Chegade Refai v. Lazaro*, 614 F. Supp. 2d 1103, 1121 (D. Nev. 2009).

21 None of the defendants is entitled to discretionary immunity for this claim because
 22 discretionary immunity is not available for intentional torts. *See Franchise Tax Bd. of State of*
 23 *Cal. v. Hyatt*, 407 P.3d 717, 733 (Nev. 2017), *rev’d and remanded on other grounds sub nom.*

1 *Franchise Tax Bd. of Cal. v. Hyatt*, 139 S. Ct. 1485 (2019). Viewing the facts in the light most
2 favorable to the plaintiffs, a reasonable jury could find that Ramos’s decision to shoot center
3 mass at two handcuffed inmates was extreme and outrageous, particularly if a jury believes
4 Castner’s version of events. A reasonable jury likewise could find that Castro and Smith telling
5 Ramos to shoot two unarmed, handcuffed inmates and then not intervening to stop the shooting
6 was extreme and outrageous. And a reasonable jury could find that the de facto policy of using
7 shotguns as the primary means of controlling inmates was extreme and outrageous. As discussed
8 in relation to the requisite culpable mental state for the Eighth Amendment claim, a reasonable
9 jury could also find the defendants acted either intentionally or with reckless disregard for
10 causing emotional distress.

11 However, even assuming the children could bring an IIED claim in their own right, the
12 plaintiffs point to no evidence of the children’s extreme emotional distress. Attorney argument
13 does not raise a genuine dispute. *See Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912,
14 923 (9th Cir. 2001) (stating that “arguments of counsel are not evidence and do not create issues
15 of fact capable of defeating an otherwise valid summary judgment” (simplified)). I therefore
16 grant summary judgment in the defendants’ favor on this claim to the extent it is meant to be
17 based on the children’s extreme emotional distress.

18 To the extent this claim is brought by Victor Perez as special administrator of Perez’s
19 estate, a reasonable jury could find that Perez suffered extreme emotional distress from being
20 shot multiple times, particularly if the jury believes the officers’ version that Perez was
21 conscious through at least the third live round. The defendants argue that a decedent’s estate
22 cannot recover emotional distress damages on an IIED claim under Nevada’s survival-of-action
23 statute because those damages are statutorily assigned to the heirs under the wrongful death

statute. *See* Nev. Rev. Stat. § 41.100(1) (“Except as otherwise provided in this section, no cause of action is lost by reason of the death of any person, but may be maintained by or against the person’s executor or administrator.”); Nev. Rev. Stat. § 41.085(5) (providing that heirs who bring a wrongful death claim may recover “damages for pain, suffering or disfigurement of the decedent”). But the Supreme Court of Nevada and the Nevada Court of Appeals have held that the survival and wrongful death statutes “are not mutually exclusive, and claims under Nevada’s survival of action statute are separate and distinct from wrongful death claims.” *Schmutz v. Bradford*, No. 58612, 129 Nev. 1150, 2013 WL 7156301 (Nev. Dec. 19, 2013) (holding that a medical malpractice claim and a wrongful death claim could be pleaded in the alternative); *Est. of Faranesh v. Eighth Jud. Dist. Ct. In & For Clark*, No. 73267, 134 Nev. 935, 2018 WL 3217994, at *2 (Nev. Ct. App. 2018) (holding that the decedent’s special administrator could pursue both negligence and wrongful death claims because the claims are “separate and distinct”). Thus, the special administrator may seek to recover for Perez’s emotional distress under the separate and distinct common law IIED tort.¹⁷ I therefore deny the defendants’ motions for summary judgment on the estate’s IIED claim for Perez’s emotional distress.

V. SEALING

Some of the parties’ filings violate Local Rule IC 6-1 by including, among other things, the minor children’s names and dates of birth. *See, e.g.*, ECF Nos. 146-2; 153; 157. I direct the parties to review all the filings to identify what needs to be sealed with a redacted version publicly filed. By August 1, 2022, the parties shall file a joint statement identifying by docket

¹⁷ I do not need to address at this point issues related to a potential double recovery for Perez’s emotional distress.

1 number the filings that need to be sealed. For any document I order sealed, the filing party must
2 file a redacted version within ten days of my order sealing it.

3 **VI. CONCLUSION**

4 I THEREFORE ORDER that defendant Jeff Castro's motion for summary judgment
5 **(ECF No. 146) is GRANTED in part** as set forth in this order.

6 I FURTHER ORDER that defendant Raynaldo-John Ramos's motion for summary
7 judgment **(ECF No. 147) is GRANTED in part** as set forth in this order.

8 I FURTHER ORDER that defendants Ronald Oliver, Greg Cox, Dwight Neven, Timothy
9 Filson, and the State of Nevada's motion for summary judgment **(ECF No. 153) is GRANTED**
10 **in part** as set forth in this order. Because no claims remain against Ronald Oliver, the clerk of
11 court is instructed to terminate him as a defendant in this action.

12 I FURTHER ORDER that defendant Isaiah Smith's motion for summary judgment **(ECF**
13 **No. 159) is GRANTED in part** as set forth in this order.

14 I FURTHER ORDER that the defendants' motion for leave to file supplemental authority
15 **(ECF No. 201) is GRANTED.**

16 I FURTHER ORDER that, by **August 1, 2022**, the parties shall file a joint statement
17 identifying by docket number the filings that need to be sealed.

18 DATED this 11th day of July, 2022.

19
20 
21 _____
22 ANDREW P. GORDON
23 UNITED STATES DISTRICT JUDGE